

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

AMO DEVELOPMENT, LLC,)
AMO MANUFACTURING USA, LLC,)
and AMO SALES AND SERVICE,)
INC.,)

Plaintiffs,)

v.)

ALCON VISION, LLC, ALCON)
LABORATORIES, INC., and ALCON)
RESEARCH, LLC,)

Defendants.)

ALCON, INC., ALCON RESEARCH,)
LLC and ALCON VISION, LLC,)

Counterclaim-Plaintiffs,)

v.)

AMO DEVELOPMENT, LLC,)
AMO MANUFACTURING USA, LLC,)
AMO SALES AND SERVICE, INC.)
and JOHNSON & JOHNSON)
SURGICAL VISION, INC.,)

Counterclaim-Defendants.)

REDACTED - PUBLIC VERSION

C.A. No. 20-842-CFC-JLH

[REDACTED]

**ALCON'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT (NO. 2) THAT ONLY AMO DEVELOPMENT, LLC IS
ENTITLED TO ACTUAL DAMAGES**

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* All emphasis added, and citations and marks omitted, unless otherwise indicated.

I. NATURE AND STAGE OF THE PROCEEDINGS

Only “[t]he *copyright owner* is entitled to recover ... actual damages suffered by him or her as a result of the infringement.” 17 U.S.C. §504(b). Here, J&J¹ alleges that “AMO Development owns the Asserted Copyrights (*and all rights thereunder*).” D.I. 141 ¶55.² The Asserted Copyrights relate to the iFS laser, a LASIK device that does not compete against the accused LenSx device, which performs femtosecond laser-assisted cataract surgery (“FLACS”). Accordingly, J&J does not claim lost profits from sales of the iFS laser. It, however, claims lost profits from [REDACTED]

Although Catalys competes against LenSx, Catalys was created and sold by OptiMedica Corp. [REDACTED], and *not* by AMO Development (the purported copyright owner) or AMO Development’s predecessor-in-interest, IntraLase Corp. [REDACTED]

[REDACTED] Thus, J&J is not entitled to recover lost profits for Catalys-related products and services [REDACTED]

¹ “J&J” collectively refers to AMO Development, LLC (“AMO Development”); AMO Manufacturing USA, LLC (“AMO Manufacturing”); AMO Sales and Services, Inc. (“AMO Sales and Service”); and Johnson & Johnson Surgical Vision, Inc. (“JJSV”).

² The term “Asserted Copyrights” refers to the copyrights in the works that J&J alleges are infringed here. D.I. 141 ¶¶2, 33–55, 446, 451, 457, 462.

Hoping to avoid this, J&J argues that

Yet, as a matter of law, none of the evidence J&J cites [REDACTED]

The undisputed facts confirm that these subsidiaries do not hold an ownership interest in the Asserted Copyrights, and that [REDACTED]

Therefore, Alcon respectfully requests summary judgment to that effect.

II. SUMMARY OF ARGUMENT

First, AMO Development is the purported owner of the Asserted Copyrights and is not entitled to lost profits prior to [REDACTED]

³ “Alcon” collectively refers to Alcon Inc., Alcon Vision, LLC, Alcon Research, LLC, and Alcon Laboratories, Inc.



Second, J&J presented no evidence that its other subsidiaries held such an ownership interest. Thus, they are not entitled to claim lost profits.

III. STATEMENT OF FACTS

The Asserted Copyrights cover parts of the iFS computer program and technical and FDA documentation submitted by IntraLase Corp., a predecessor to AMO Development. A1894, Stamm Op. Rpt. ¶1; D.I. 141 ¶¶2, 33–55. J&J does not claim lost profits related to IntraLase Corp. or its iFS Laser. A1968-78, Stamm Op. Rpt. ¶¶167–99. Instead, [REDACTED]

██████████. *Id.* Yet, Catalys was developed by OptiMedica, not IntraLase Corp. A1914-15, *id.* ¶¶42–43. Until 2013, the two companies were not related. *Id.* ██████████

[REDACTED]. *Id.*; A2, OptiMedica Acquisition Release; Concise Statements of Facts (“CSOF”) ¶¶ 2, 4; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Instead of seeking AMO Development's lost profits, and despite J&J's allegation that "AMO Development owns the Asserted Copyrights (*and all rights thereunder*)," D.I. 141 ¶55,⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

IV. ARGUMENT

A. J&J May Recover the Lost Profits of Only the Purported Owner of the Asserted Copyrights, AMO Development

Under 17 U.S.C. §504, only “[t]he *copyright owner* is entitled to recover ... actual damages.” “‘Copyright owner,’ with respect to ... the exclusive rights comprised in a copyright, refers to the owner of that particular right.” 17 U.S.C. §§101, 106. Here, J&J asserts that “AMO Development owns the Asserted Copyrights (and all rights thereunder).” D.I. 141 ¶55; *see also* CSOF ¶1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Damages must be limited to the copyright owner’s “actual damages *suffered by him or her.*” 17 U.S.C. §504(b). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See PAR Microsystems v. Pinnacle Dev. Corp.*, 995

F.Supp. 658, 662 (N.D. Tex. 1998) (copyright holder could not recover lost profits because “PAR had no product to sell and did not lose any sales due to Pinnacle’s infringement”).

AMO Development’s inability to recover lost profits is analogous to patent cases where “[o]nly the patentee can recover lost profits, and only for products that it sells. Related entities and corporate affiliates cannot recover lost profits.” *Microchip Tech. Inc. v. Aptiv Servs. US LLC.*, 2020 WL 5203600, at *4 (D. Del. Sept. 1, 2020) (citing *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1367 (Fed. Cir. 2008)); *see also Intuitive Surgical, Inc. v. Auris Health, Inc.*, 2021 WL 3662842, at *2–3 (D. Del. Aug. 18, 2021) (granting summary judgment of no lost profits because “no evidence of ‘inexorable flow’” from parent to subsidiary). [REDACTED]

[REDACTED] *Cf. Poly-Am., L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1311 (Fed. Cir. 2004) (to claim lost profits, “the patentee needs to have been selling some item, the profits of which have been lost due to infringing sales”).

B. No Other Entity Has an Ownership Interest Sufficient to Recover Lost Profits

Despite its representation that “AMO Development owns the Asserted Copyrights (*and all rights thereunder*),” D.I. 141 ¶55, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Yet, to claim those lost profits, J&J must establish that each entity holds “enough rights . . . to make it ‘[t]he legal or beneficial owner of an exclusive right’ under the Copyright Act.” *See HyperQuest, Inc. v. N’Site Sols., Inc.*, 632 F.3d 377, 382 (7th Cir. 2011); *see also John Wiley & Sons, Inc. v. DRK Photo*, 882 F.3d 394, 415 (2d Cir. 2018) (affirming grant of summary judgment for failure to establish beneficial ownership interest). It cannot do so for two reasons.

First, JJSV and AMO Ireland are not copyright plaintiffs in the case and, thus, not entitled to recover damages. *See generally* D.I. 141. Had J&J wanted to recover such purported damages, it should have named these entities and proved they had ownership interests sufficient to convey standing. *See HyperQuest*, 632 F.3d at 382; *see also John Wiley*, 882 F.3d at 415.

Second, there is no evidence that the subsidiaries have the required interest in the Asserted Copyrights. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] This failure is telling. *See Pak's Trading Eur. B.V. v. Target*, 2018 WL 8333362, at *7 (C.D. Cal. July 5, 2018) (dismissing copyright claims due to lack of ownership despite allegations of a corporate relationship). J&J's other purported evidence is equally unavailing.

1. J&J Cannot Recover JJSV's Lost Profits.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] a parent-subsidiary relationship is insufficient to confer an ownership interest. *See ABKCO Music, Inc.*

v. Sagan, 2018 WL 1746564, at *8 (S.D.N.Y. Apr. 9, 2018) (“Nor does a parent company [have] standing to bring claims on behalf of its subsidiary.”); *cf. Hologic, Inc. v. Minerva Surgical, Inc.*, 163 F.Supp.3d 118, 121–22 (D. Del. 2016) (“The fact that a corporate parent’s subsidiary owns a patent is not enough to establish that the parent has a legal ownership interest in the subsidiary’s patent.”). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See HyperQuest*, 632 F.3d at 382 (non-exclusive licensee “not entitled to complain about any alleged infringement of the copyright”); *John Wiley*, 882 F.3d at 415 (“mere interest in a copyright” insufficient, “even if that interest is valuable”). Thus, the undisputed facts show that, as a matter of law, JJSV does not hold an ownership interest in the Asserted Copyrights and cannot recover lost profits.

2. J&J Cannot Recover AMO Manufacturing, AMO Sales and Service, or AMO Ireland's Lost Profits.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

the undisputed evidence shows that none of these entities holds an ownership interest in the Asserted Copyrights, and damages allegedly suffered by them are not recoverable. *Cf. Poly-Am*, 383 F.3d at 1311.

V. CONCLUSION

Accordingly, Alcon respectfully requests summary judgment on this issue.

Respectfully Submitted,

/s/ Andrew E. Russell

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WORD COUNT CERTIFICATION

The undersigned counsel hereby certifies that Alcon's Brief in Support of its Motion for Summary Judgment (No. 2) contains 2,337 words excluding the cover page, tables and signature blocks, as counted by Microsoft Word, in 14-point Times New Roman font. Alcon's case dispositive motions and *Daubert* motions combined contain 12,500 words or less.

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